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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 29, 2004

Case No.: TIA-0296

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Worker was employed as a sheet metal worker at the DOE's Rocky Flats Plant (the plant) for approximately 26 years, from 1969 to 1995.

The Applicant filed an application with the OWA, requesting physician panel review of two illnesses, skin cancer and lung granulomas. The Applicant claimed that his illnesses were the result of being exposed to toxic substances during his work at the plant.

The Physician Panel rendered a negative determination with regard to the claimed illnesses. The Panel agreed that the Applicant had skin cancer, but found that it was not related to toxic exposures at the plant. Although the Panel stated that skin cancer has been associated with polycyclic aromatic hydrocarbons and arsenic compounds, the

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g)

Panel found that the record indicated insignificant or no exposure to these substances. The Panel also found that the Applicant's lung granulomas were not related to exposure at the plant. The Panel acknowledged that granulomas can be caused by toxic substances. However, the Panel found that since the Applicant's granuloma was a single lesion, it was most likely the result of an old tubercular or fungal infection.

The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal. In his appeal, the Applicant states that the Panel should reevaluate several of the medical and incident reports contained in the record. He asserts that the incident reports show radiation contamination and, therefore, support his skin cancer claim. With respect to the lung granuloma claim, the Applicant believes that his condition was caused by inhalation of plutonium and americium. In support of this assertion, he refers to an occupational exposure record that documents positive lung counts.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's disagreement with the Panel's review of the information contained in the record does not demonstrate Panel error. The Panel identified a number of toxic substances, including radiation, to which the Applicant was potentially exposed. However, the Panel concluded that these substances were not occupational causes of skin cancer. Moreover, the Panel stated that although certain toxic chemicals have been linked to skin cancer, there was little or no evidence in the record to demonstrate that the Applicant was exposed to these substances. Similarly, although the Panel recognized that granulomas can be caused

by toxic substances, such as beryllium, it determined that the nature of Applicant's granulomas was not indicative of such exposure. Accordingly, although the Applicant's appeal expresses disagreement with the Panel's medical judgment, the appeal does not indicate Panel error.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0296 be, and hereby is, denied.
- (2) The denial pertains only to this appeal and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005